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IN THE MATTER OF THE APPLICATION OF ALBERT HEFF FOR A WRIT OF HABEAS CORPUS. } No. 14 Original.

SUPPLEMENTAL BRIEF OF PETITIONER.

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An Indian who has received an allotment under the Act of Congress of February 8th, 1887, is a citizen of the United States and the State in which he resides. The Act of Congress of February 8th, 1887, provides in Section 6:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the

rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be noticed that section six provides that Indians may become citizens of the United States in three different ways: *First.* Every Indian to whom allotments shall have been made under the provisions of the Act of Congress of February 8th, 1887. *Second.* Or any Indian who has received any allotment under any law or treaty. *Third.* Every Indian born within the territorial limits of the United States who has voluntary taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life.

United States v. Kopp, 110 Fed. 165.

It will be noticed that the Indians belonging to the second and third class became citizens immediately upon the passage of the Act of Congress of February 8th, 1887. The Indians under the first class were to become citizens as soon as they had received an allotment under the Act of Congress of February 8th, 1887. It is not necessary for the Indian to receive the final patent to become a citizen but he becomes a citizen immediately upon the allotment being made to him. It is suggested in the latter part of section six that the accepting of the allotment by an Indian, a member of a tribe, shall not in any manner impair or otherwise affect the right of any such Indian to tribal or other property. This provision clearly indicates that it was the intention of the law-makers to make them citizens and put them in a position so that they could settle up their business. In the latter part of section five this language is used:

"And hereafter in the employment of Indian police,

or any other employes in the public service among any of the Indian tribes, or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become *citizens* of the United States shall be preferred."

The foregoing language clearly shows that it was intended by the Act to confer upon each allottee the rights of citizenship upon the issuance of the first patent. It makes little difference in this case whether the first patent is called a certificate or a patent, because the rights of citizenship were intended by said act, to be conferred upon each allottee upon the issuance of the first patent or certificate. Congress saw fit to call the first deed a patent, and all through the Act it is referred to as a patent, and for that reason the court must construe the act the same as if they had stated that upon the completion of the allotments and the issuance of the certificates therefor, each and every allottee shall be subject to the laws of the state both civil and criminal.

"Upon the completion of the allotments," means when the allotting agent has completed the allotments and they have been approved by the Secretary of the Interior, then the first patents shall be issued and at that time the allottees will become citizens of the United States. Having become citizens of the United States they would also become citizens of the state in which they reside.

Fourteenth Amend. U. S. Constitution;
Boyd v. The State of Neb., 143 U. S. 162;
Gassies v. Ballon, 6 Peters (U. S.) 761.

The question, whether Indians who have received allotments under the Act of Congress of February 8th, 1887, are citizens, has been decided by a number of courts.

State v. Denoyer, 72 N. W. Rep. 1015;
State v. Morris, 55 N. W. Rep. 1086;

Wa-La-Note-Tke-Tynin v. Carter, 53 Pac. 106;
United States v. Rickert, 106 Fed. Rep. 5;
In Re Now-Ge-Zhuck, 76 Pac. Rep. 877;
Farrell v. United States, 110 Fed. Rep. 942;
People v. Bray, 38 Pac. Rep. 732;
Beck v. Flourney Live Stock & Real Estate Co., 65 Fed. Rep. 35;
Keokuk v. Ulam, 38 Pac. Rep. 1080;
United States v. Hadley, 99 Fed. Rep. 437;
Ells v. Ross, 64 Fed. 417. Opinion by Justice McKenna.

It appears from the reports of the United States Indian agents in charge of the Kansas reservations that lands were allotted in severalty, under the provisions of the act of February 8th, 1887, to all the Indians of the Kickapoo reservation before the end of February, 1895, except to children born since that date. (Ann. Rep. Dep. Int. of 1897, p 151; *id*, 1902, pt. 1, p. 217.)

In *United States v. Kopp*, 110 Fed. 160-166, it is said:

"The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the United States, having all the rights, privileges and immunities of other citizens, and they are not under guardianship of the United States government nor under the charge of any Indian superintendent or agent, and the statute of 1897 prohibiting the furnishing of intoxicating drinks, flavoring extracts, bitters, and stimulants to Indians having the status and subject to the conditions therein defined, does not comprehend an Indian having the status and the rights, privileges and immunities belonging to the Indian named in this indictment."

It is urged by the respondents in this case that the Act of Congress of January 30th, 1897, is a legislative construction of the prior Act of February 8th, 1887. What are the provisions of said Act? The Act of January 30th, 1897, as far as relevant to this argument, is as follows:

"That any person who shall sell, give away, dispose

of, exchange or barter, any malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound composition, or any article whatsoever, under any name, label, or brand, which produces intoxication to any Indian to whom allotment of land has been made, while the title to the same shall be held in trust by the government, or to any Indian, a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments exercises guardianship," etc.

By said Act, it is made a crime for any person to sell or give away intoxicating liquor. *First:* To any Indian to whom an allotment of land has been made, while the title to the same shall be held in trust by the government. *Second:* To any Indian who is a ward of the government, under charge of an Indian superintendent or agent. *Third:* To any Indian, including mixed bloods, over whom the government, through its departments exercises guardianship.

If the foregoing act is a legislative construction of the prior Act of 1887, it may well be said that Congress made a distinction between Indians who had received allotments of land in severalty and wards of the government. From the provisions of this Act, it is claimed that Indians who had received allotments were not considered wards of the government, but occupied a different relation thereto. If such Indians had been considered wards of the government at the time of the passage of said Act, why should they have been referred to as Indians who had received allotments? It is contended by the respondents in their supplemental brief that Indians who have received allotments under the Act of Congress of February 8th, 1887, are not citizens of the United States, and will not be until the period of twenty-five years has elapsed during which time their land is held

in trust by the government. It is urged that this is neccessary for the protection of the Indians and that Congress did not intend to make them citizens of the United States and of the states because they are not qualified for citizenship. In the same act there is a provision that every Indian who has separated himself from his tribe and put on the habits of civilized life shall become a citizen immediately upon the passage of the Act. It is also provided in said Act that every Indian who had theretofore received an allotment under any law or treaty should immediately become a citizen of the United States. If such Indians are qualified to become citizens why should not the Indian who received his allotment under the Act of February 8th, 1887, also be qualified to become a citizen?

In connection with this argument I desire to call this court's attention to the brief of respondent, pages 19 and 20, in which they argue that such Indians are citizens.

It is claimed on page 12 of the supplemental brief of the respondent's that the case of *Ohio v. Thomas*, 173 U. S. 276, holds:

"That a state had no authority to interfere with the administration by Congress of a National Soldiers' Home located within its limits; nor, in the exercise of its police power to regulate or probibit the use of any article of food which had been approved by the management of the Home under the authority of Congress. This conclusion was not based upon the ground that Congress had exclusive jurisdiction over the place where the Home was located, because such was not the fact, the place being within the jurisdiction of the State."

This is misleading as the case was decided solely upon the one fact, that the governor of the Soldiers' Home being a Federal officer and acting under the authority of Congress was not subject to the State laws. In the opinion of said case on page 284, it is said:

"Assuming, in accordance with the decision of the State Court, the Act of the Ohio legislature applies in its terms to the Soldiers' Home at Dayton, in that state, we are of the opinion that the governor was not subject to that law, and the court had no jurisdiction to hear or determine the criminal prosecution in question, because the Act complained of was performed as a part of the duty of the governor as a Federal officer, in and by virtue of said Federal authority, and in the performance of that duty he was not subject to the direction or control of the legislature of Ohio."

The first case is not in point as the rights of a Federal officer is not involved herein, nor is the power of Congress to say what food shall be supplied to a National Soldiers' Home.

In *United States v. Rickert*, 188 U. S. 432, this court made use of language that would indicate that the Indians who held allotments were wards of the Government. This petitioner will concede that they are wards of the Government if it is based upon the fact that the Government acts as the guardian only, over their lands and monies, and not over the person of the Indian. This is clearly within the definition of guardian and ward.

15th Am. & Eng. Enc. of Law, 20 (2d ed.)

It is true that in that case this court points out that the word patent is improperly used to describe the instrument issued by the Secretary of the Interior upon the completion of the allotments. It makes no difference whether they named it a patent or a certificate, the language of the Act is, that upon the completion of the allotments and the patenting of the same, each and every allottee would become subject to the laws of the state, both civil and criminal. It is clear that the law-makers intended that upon the issuance of the patent, or certificate that each allottee should become a citizen of the United States. The question discussed in the *United States v. Rickert*, by this court was, whether or not the

improvements on the allotments and the personal property of the allottee Indians could be taxed, and this court held that they could not. The question of the Indian's citizenship was not raised in this case, but the case itself was decided upon the theory that they were citizens. (Brief of Respondents, pages 19 and 20.)

Congress derives its power to prohibit the sale of intoxicating liquors, in the state, to an Indian from this provision of the Constitution of the United States, to-wit:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

When the Constitution was adopted these Indian tribes were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white.

When the Constitution was adopted the Indians were not claimed to be a part of the government of the United States, and therefore, had the right to determine for themselves what commerce they would engage in. In the year 1871 Congress determined upon a new departure; to govern them by Acts of Congress.

Section 2079 Revised Statutes. (Page 18 of brief of Petitioner).

It was provided therein that the Indian tribes within the boundaries of the United States would no longer be treated as independent nations, but should thereafter be ruled by Acts of Congress.

We think that at that time Congress lost all right to control commerce between this government and Indian tribes when off their reservations.

They no longer possessed the necessary character for Congress to exercise such power.

There can be no qualified citizenship because it would, in effect, limit the police powers of the state.

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